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## LEGISLATIVE DRAFTING IN LONDON AND IN WASHINGTON \*

REED DICKERSON <sup>1</sup>

THE meetings of the American Bar Association held in London in 1957 furnished an incidental but valuable opportunity to inquire into the methods of English legislative draftsmanship and to make some useful comparisons with its counterpart in Washington.

The first striking fact that emerges in such a comparison is that almost all the public laws enacted by Parliament are drafted by one small group of men, the expert draftsmen of the Office of the Parliamentary Counsel.<sup>2</sup> This is in sharp contrast to the situation in Washington, where legislation is prepared by the Offices of the Legislative Counsel of the House and Senate, by members of the professional staffs of the many standing and special committees of Congress, by the legal staffs of the executive departments and agencies, and even by members of the public.<sup>3</sup> Since this aggregate is very large, the question immediately arises: Why so few and so concentrated in London and why so many and so dispersed in Washington?

One obvious explanation would seem to be that the greater size and complexity of the United States must inevitably result in a larger number of, and more difficult, legislative problems, too large for any single drafting group to handle. But even a cursory examination of the recent statute books shows a physical volume of English public laws quite comparable to that appearing during the same period in the Federal Statutes at Large. Indeed, there is some reason to believe that Parliament's ultimate legislative responsibility may even be greater than that of Congress, since it includes matters that in the United States would be the subject of state control or otherwise circumscribed by the Constitution. But whatever the exact ratio may be, it hardly parallels that formed by the respective numbers of participating draftsmen.

\* This article has already appeared in the American Bar Association Journal, 1958, and is here republished with consent.

<sup>1</sup> Professor of Law at Indiana University School of Law; author of *Legal Drafting* (1954); formerly of the Office of General Counsel, Department of Defense, U.S.A.

<sup>2</sup> Exceptions: Consolidated Fund Bills; Statute Law Revision Bills; Bills extending exclusively to Scotland; Private Members' Bills.

<sup>3</sup> Members of Congress sometimes draft legislation, but for the most part they cannot take the time.

Another, and more satisfactory, explanation is that the British draftsmen in the Office of the Parliamentary Counsel are permitted to make an enormously more efficient use of their time than the draftsmen of American Federal legislation. This is rooted for the most part in the much tighter control of the Government<sup>4</sup> over the legislative programme. With the legislative and executive branches fused in the persons of the cabinet ministers, who are also members of Parliament, and with the Government in strict control of the use of parliamentary time, the chances of the legislature's failure to support the Government's programme is much less in England than it is in the United States. (Failure to support the programme would bring down the Government.) This control is enhanced by a more effective integration of policy decisions and a significantly tighter party discipline. The result is that once the Government decides to push a legislative measure its ultimate enactment becomes almost a certainty. It is rare for the Government to have to abandon a bill. Conversely, a bill sponsored by an individual member of Parliament has a relatively small chance of success. In Washington, on the other hand, all bills are individually sponsored in form and a large proportion of them are individually sponsored in substance.

Since the Office of the Parliamentary Counsel directs its efforts almost exclusively toward Government bills and serves only the political party in power, it follows that an overwhelmingly large proportion of the bills drafted by that Office are successful and a correspondingly small proportion are unsuccessful. In contrast, it seems safe to say that the greater part of the Washington draftsman's efforts are ultimately unproductive.

A third, though less important, explanation is that many subordinate legislative matters that in Washington are handled as straight legislation have in London been turned over to the executive agencies to be handled principally as administrative regulations, with an assent or acquiescence from Parliament.

Because of the constitutional separation of powers in the United States, there is an important distinction between legislation enacted by Congress and that in effect enacted by executive agencies in the form of administrative regulations. Constitutionally, Congress is supposed to be incapable of abdicating its legislative functions, and the kind of legislative function that has in fact been delegated to the individual executive agencies has been legitimated by accompanying the authorisation with general statutory guides or by confining it in closely restricted channels. As a result, the scope of the

<sup>4</sup> i.e., "the Administration," in Washington terminology.

regulatory activities of United States executive agencies has been more modest than in England. However, within the areas within which these agencies have been allowed to operate, they have for the most part been allowed to act without further Congressional participation, except that inherent in reporting and publication requirements and in Congress's general appropriation and investigatory powers.

Compare the role of "delegated" or "subordinate" legislation in England. Free of such constitutional inhibitions, Parliament has seen fit to delegate a significant part of the overall legislative job to the executive agencies, and in each case the authority of the particular agency is measured wholly by the charter granted by the parent statute relating to the subject-matter in question. While broadening Parliament's legislative reach, as well as that of the Office of Parliamentary Counsel, it has put a relatively larger burden on the executive agencies.

Delegated legislation is of three major kinds, depending upon the degree of control retained by Parliament. Although once Congress has delegated legislative authority it ordinarily retains no direct string on it, the same is not true in England, where general guide lines for parliamentary participation are found in the Statutory Instruments Act, 1946. In the usual situation, the parent statute provides that the regulations issued will stay in effect unless either House carries a resolution against it within forty sitting days.<sup>5</sup> The closest analogue in the United States is the reorganisation plan effectuated under the Reorganization Act of 1949. A second type is the regulation that becomes effective only if approved by a resolution of each House. This is much less common, and its usefulness as delegated legislation lies in the fact that although parliamentary action is required the burden of preparation and development rests on the particular agency and the result (as with the first type) must be taken whole or rejected whole. Such a regulation is not subject to committee action and it may not be amended on the floor. In fact, even the most controversial regulations can get an affirmative resolution in one parliamentary day. The third important type, which corresponds most closely to regulations in the American sense, is that to which no string is attached. Although in volume this kind of regulation looms large, it is confined to matters of comparative triviality.

Besides these three major kinds of delegated legislation, there is a fourth, but very exceptional, type. This is used in cases in which

<sup>5</sup> Some instruments must be submitted to Parliament in draft and do not become effective until the 40 sitting days have elapsed. See s. 6 (1) of the Statutory Instruments Act, 1946.

emergency action is necessary, or in those in which it is desirable to prevent forestalling, but the importance of the subject-matter demands affirmative resolution (*e.g.*, orders imposing customs action). Here the parent statute provides that the regulations authorised will be effective for four weeks only, unless they are affirmatively approved by both Houses.

Because (I suspect) a significant number of regulations of types one and two correspond to what would normally be enacted as law by Congress,<sup>6</sup> a comparison of drafting methods should probably include a description of how those are drafted in England. On this, a brief word later.

One field, not now very important, lies well outside the range of legislation and regulation already discussed: legislative matters falling within the royal prerogative. The most important area here is the military, as to which the Crown retains a number of powers. With respect to these the Crown may legislate in the Queen's name, usually in the form of orders and sometimes in the form of regulations, but always without needing an enabling act of Parliament or its later approval or acquiescence. Parliament could, of course, step in and take charge of this area at any time.

So much for the general context in which legislation is prepared. What about the draftsmen and their methods?

The Office of Parliamentary Counsel dates from 1869. Before that time, much of England's legislation was drafted in the Temple by persons with little or no experience. The Treasury, in the exercise of its management (as distinct from money) functions, which correspond to those exercised by Washington's Bureau of the Budget, established the Office and manned it with the Home Office's draftsman, Lord Thring, and an assistant. These two lawyers became the draftsmen of the great bulk of government legislation. In any period this would be no mean feat. In a day before typewriters and shorthand it must have been extraordinary.

Although the Treasury remains the nominal sponsor of the Office of the Parliamentary Counsel, in practice the Office works in closer liaison with the cabinet office. But, unlike the Offices of the Legislative Counsel of the House and Senate in Washington, it remains the servant of the executive branch rather than the legislative.

The present staff consists of a First Parliamentary Counsel, a Second Parliamentary Counsel, five undesignated Parliamentary Counsel, and ten Assistant Parliamentary Counsel. This total of seventeen draftsmen compares with eleven for the Office of the

<sup>6</sup> This suspicion is based on a comparison of the English and American military laws. However, Henry P. Rowe writes that he doubts that it has yet been verified generally.

Legislative Counsel of the Senate and ten for that of the House of Representatives.

The First Parliamentary Counsel assigns the work, but beyond that he does a minimum of office administration, devoting as much time as he can to drafting. The six other Parliamentary Counsel, once they have received their assignments, work independently and autonomously, except that each has the services of one of the Assistant Counsel, who rotate under a system of approximately one-year assignments. On most bills, therefore, the lawyers work in pairs, and it is only in the case of a relatively few of the less important bills that either works solo. This in general corresponds to the "buddy system" used in some of the states of the United States. The fact is significant because it confirms what many believe to be an essential characteristic of drafting—the team approach. The individual Parliamentary Counsel concerned remains solely responsible for the result, but he has the benefit of the cross checking and counter-balancing of his Assistant. In this respect, the Offices of Legislative Counsel of the Senate and the House differ in that their draftsmen tend to work more on an individual basis, except as circumstances and complications suggest the desirability of consultation and cross checking, or of a team approach, which is usually the case with the more important bills.

With a partial exception for finance bills, there is no specialisation according to subject-matter. The positive reason is that the Office must move quickly and work is speeded by assigning bills according to workload rather than by subject-matter. The negative reason is that specialisation is unnecessary because it is believed that the draftsman's main function is to know the questions rather than the answers. For the facts he can, like his Washington counterpart, go to an expert and ask questions; for the law, he does much of his own research, but in discharging his responsibility he leans heavily on the departmental lawyers familiar with the particular subject-matter. In this way a good draftsman can turn out a professional result without previously being an expert in the particular field. (This approach rejects the view that the best person to draft a statute is the lawyer who in the first instance is the most familiar with the specific subject-matter.)

Work on a bill is not undertaken casually. Only the departments can initiate legislation draftable by the Office of the Parliamentary Counsel, and this can be done only through the minister concerned and with the approval of his fellow ministers. This consists of getting the approval of (1) the appropriate policy committees of the cabinet and (2) the programming committee.

The minute of the programming committee constitutes the departmental credential for the proposed bill. This is subject to the usually *pro forma* approval by the Treasury, a carry-over from the time when there was no adequate programming committee. The final step is for the legal adviser to the department concerned to prepare departmental instructions, addressed to the Parliamentary Counsel and specifying in particular what the proposed legislation is intended to embody. A good departmental instruction will be comprehensive and will frequently refer to relevant statutes and court cases. The Parliamentary Counsel discourages instruments couched in the form of proposed statutes on the ground that the inexperienced authors of such attempts usually succeed in obscuring their specific objectives instead of being helpful to the draftsman.

The system just described is further reason for the greater productivity of London draftsmen and it is in refreshing contrast to the slipshod habits in Washington, where even the sophisticated draftsmen of the Senate and House have not adequately coped with the prevalent tendency to rush into "legal language" each tentative expression of uncrystallised policy.

In Washington the Congressional committee practice of considering only full-blown bills, a very large proportion of which originate in the executive agencies as expressions of proposed (and thus tentative) policy, means that much of the initial drafting work must later be redone. With executive powers constitutionally separated from legislative powers, this is unavoidable. Moreover, a committee's policy changes are usually reflected in concurrent drafting changes made under conditions that handicap even the expert draftsman. Finally, once a committee has concluded its policy deliberations, the bill's sponsors are strongly tempted to push for immediate floor consideration. Meanwhile, any thorough-going attempt to solve the remaining drafting problems is likely to stumble over the belief that the committee's policy decisions have somehow sanctified the specific wording in which those decisions happened, in the confinement of formal deliberation, to have been expressed. As a result, what started out as an adequately drafted bill may end up as crude patchwork.

Some of this could be avoided if Congressional committees ceased definitive redrafting as they changed policy and, especially, if they took fuller account of the fact that, although it is comparatively easy to change the plan of a building at the blueprint stage, it is hard to change it once the building is largely completed. Thus, they might well concentrate more on substantive policy and leave the perfecting language changes to their draftsmen, to be carried out uninhibited by the exigencies of formal committee deliberation.

In the composition of statutes, the Office of the Parliamentary Counsel exercises a high degree of independence and the client makes little attempt to intrude into matters of technique and form. Suggestions relating to these matters are politely received, but the Office exercises its own best judgment. At the same time the draftsmen are sophisticated enough to recognise situations in which important political considerations require concessions in form and approach. In this respect there appears to be no significant difference in the initial drafting of bills between the Office of the Parliamentary Counsel and the Offices of the Legislative Counsel of the House and Senate. However, after the bill reaches the committee stage, where in Washington significant changes are more likely to be made, the draftsman has less of a free hand.

One matter of Parliamentary procedure, incidentally, has had a mild effect on the form that extended bills would otherwise take. The Committees' practice of approving bills section-by-section, beginning at the beginning, has affected the arrangement of bills by causing (1) the introductory sections to be limited to general principles, with detailed qualifications deferred for development in later sections, and (2) the definitions to be placed at the end, instead of at the beginning, as is usually done in American bills.

Although the Office of the Parliamentary Counsel remains an arm of the executive branch for the purpose of serving that branch, it frequently advises the clerks of the standing committees on the supposed meaning of amendments proposed to be made in bills already introduced and under consideration by Parliament. Although in this role the draftsman acts as independent adviser on the bill, he is in a relationship of complete trust with the clerk, who is not a lawyer. His advice is frank and it includes technical matters, such as points of order, that in Washington would be handled by the Parliamentarian (Parliament has no such officer).

It is interesting also to compare the handling of what are known in the United States as "codification" bills and in England as "consolidation" bills, that is, unified restatements of existing statutory law. In Washington, codification bills are prepared under the sponsorship of the Law Revision Subcommittee of the Committee on the Judiciary of the House of Representatives. In most instances they are farmed out to particular executive agencies or to private publishing concerns, and when introduced they have a standing no different from that of any other kind of bill. In England, all consolidation bills are prepared by a consolidation branch set up within the Office of the Parliamentary Counsel and consisting, at the present time, of three lawyers, two of whom are drawn on an approximately two-year rotating basis from the



personnel of the Office as a whole. The third lawyer is permanently assigned to this work. The separate branch was set up in 1947 to keep the non-consolidation bills from pre-empting the field.

Consolidation bills are immune from substantive amendment, because under Parliament's rules of relevance such an amendment is not germane to the subject matter of a bill whose only object is to restate existing law. The Consolidation of Enactments (Procedure) Act, 1949, extends this immunity to consolidation bills that contain some small departures from the substance of existing law, provided the departure is not substantial. Thus, standardisation of minor aspects of procedure does not take such a bill out of the protected class.

A closely related kind of bill is the bill "To consolidate with amendments. . . ." This approach is used in those cases where the text of existing law is badly cluttered with inconsistencies and irrationalities resulting from successive layers of legislation. Briefly, it consists of a start-from-scratch attempt to restate what is believed to be the substance of existing law, without attempting to account for each provision of current text. Such bills normally contain some substantive changes. Not enjoying a privileged status, they are subject to amendment like any other bill. Recent examples include the Customs and Excise Act, 1952, and the Army Act, 1955.

Delegated (or "subordinate") legislation, on the other hand, is normally drafted by government lawyers assigned to the agency concerned. (Only that of exceptional importance is drafted by the Office of the Parliamentary Counsel.) In the Ministry of Transport and Civil Aviation, for example, delegated legislation is handled by the Principal Legal Adviser and a staff of seven lawyers who, though they are employed by the Treasury, are assigned to serve the legal needs of the Ministry of Transport and Civil Aviation. The problem of diversity is minimised (1) by the small size of the total legal staff, all of whom spend a considerable part of their time drafting, and (2) by the fact that all important regulations clear through one person, the Principal Legal Adviser, who in the case of the current incumbent happens to be a graduate of the Office of the Parliamentary Counsel.

The significant differences between legislative drafting in London and that in Washington do not lie in any differences between the methods and skills of the Office of the Parliamentary Counsel and those of the Offices of the Legislative Counsel of the House and Senate, for which the similarities are more striking than the differences. They lie, instead, in the fact that in Washington proposed legislation is much more vulnerable to redrafting, under

conditions that are not always favourable to the practice of the drafting art, and in the fact that the greater bulk of legislative drafting is done outside those Offices and in many instances by persons of more modest experience and skill. Whereas in London the typical bill is drafted by a full-time professional, in Washington it is drafted by an inexperienced lawyer, a heterogeneous *ad hoc* committee, or a partly experienced lawyer whose drafting duties are a mere incident to his other duties. Contributing to this situation is the popular assumption that a law school diploma carries with it full competence to draft any legal document, including the most complicated and sensitive legislation. That this assumption has not been supported by the results does not appear to have caused widespread concern.

Equally important is the fact that in Washington legislative drafting is done by a far larger number of draftsmen. Even among draftsmen of uniform ability the dissipation of the general chore of drafting legislation among a large number of lawyer groups reflecting different governmental attitudes and approaches, some of whom are subject to rapid turnover, is inevitably reflected in the legislative results. Certainly the most fertile single source of confused, difficult-to-read, overlapping, and conflicting statutes is the lack of uniformity in approach, terminology, and style. The ravages of heterogeneous authorship appear to be large in Washington and small in London. Nor is there a presently available solution in Washington, in the absence of any effective screening of legislation generally.

Such screening is not provided by any agency of Congress, except with respect to "codification" (consolidation) bills, all of which funnel through the House Judiciary Committee. Nor is it provided by the executive branch except as a particular agency may achieve a degree of uniformity with respect to specific statutes within its own limited orbit. Viewed broadly, the Tower-of-Babel problem is much greater in Washington than it is in London and it has been dealt with less successfully. Unless there is a major reorganisation of the Congressional drafting services, the only effective control of uniformity problems rests with individual executive agencies (which initiate the bulk of the legislation that affects their operations), working in close conjunction with the appropriate committee staffs. In the smaller agencies, with their smaller legal staffs, the problem of heterogeneous authorship may not appear to be marked, but in such sizeable agencies as the Department of Defense it remains a significant and baffling problem.